No. 93-1170

FILED

DEC 2 6 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

NATIONAL TREASURY EMPLOYEES UNION, *et al.*

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS, NATIONAL TREASURY EMPLOYEES UNION, *ET AL.*

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63 pp

QUESTIONS PRESENTED

Section 501(b) of the Ethics in Government Act of 1978, as amended, 5 U.S.C. app. 501(b) (Supp. IV 1992), prohibits the receipt of "anything of value" for any appearance, speech or article by Members of Congress and by officers and employees of the federal government. The questions presented are:

1. Whether a ban on receipt of compensation for expressive activities unrelated to official duties unconstitutionally restricts the First Amendment rights of executive branch employees because it singles out expressive activities for a discriminatory burden and is broader than reasonably necessary to serve a substantial governmental interest.

2. Whether the court of appeals correctly invalidated Section 501(b) as applied to executive branch employees, leaving it to Congress to narrow the ban, rather than attempting to render the statute constitutionally sound by fashioning a nexus standard of its own.

PARTIES TO THE PROCEEDING

National Treasury Employees Union Chapter 143 is a party to this proceeding, in addition to those listed by the United States.

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CONSTITUTION, STATUTES, AND REGULATIONS INVOLVED

In addition to the constitutional, statutory, and regulatory provisions set forth in the government's brief, respondents cite to an exception to 5 U.S.C. app. 501(b), found in the National Defense Authorization Act for Fiscal Year 1993, 10 U.S.C. 2161 note, which is set forth in the appendix to this brief, App. 1a-3a. Regulations establishing standards of conduct generally applicable to executive branch employees' outside activities, 5 C.F.R. 2635.801-2635.809 (1993 ed.), are set forth in the appendix to the opposition to the petition for a writ of certiorari, Opp. App. 1a-24a.

STATEMENT

A. The Regulatory Background and the Statutory and Regulatory Scheme of the "Honoraria" Ban

This case concerns the constitutionality of Section 501(b) of the Ethics Reform Act of 1989, which prohibits executive branch employees, among others, from accepting compensation for any appearance, speech, or article, even where there is no nexus between the employees' writing and speaking and their governmental duties. The ban—purportedly a measure to promote governmental integrity—singles out expressive activity for financial burden, leaving employees free to accept compensation for other nonwork-related, off-duty activity.

Respondents are career executive branch employees who, prior to the passage of the Act, wrote articles or delivered speeches on nonwork-related topics, on their own time, for compensation. They brought this action to challenge the ban as a violation of their First Amendment rights and the rights of similarly situated career employees. What follows is a description of the regulatory scheme that preceded the statutory ban, a brief overview of the ban's legislative history, and a discussion of the new regime of ethical standards implemented in its wake.

1. Government-wide regulations on ethical standards, as well as supplemental agency regulations, have traditionally encouraged executive branch employees to engage in activities such as teaching, lecturing, and writing, where they do so on their own time and without using government resources. *See, e.g.*, 5 C.F.R. 735.203(c) (1990 ed.); Joint Appendix (J.A.) 51, 106, 218. Such activity often enhances employees' professional standing and, in turn, their value to their employing agencies. J.A. 43, 89, 106, 75, 218.

Historically, the regulations were structured both to give civil servants freedom to engage in outside personal

and professional activities, including those for remuneration, and to guard against real or perceived conflict with their public responsibilities. Supplemented as necessary by individual agency restrictions, the government-wide regulations prohibited participation only in those outside activities that could create a conflict of interest or the appearance of a conflict. *See, e.g.*, 5 C.F.R. 735.201 *et seq.* (1990 ed.); J.A. 90-111, 211-219. They prohibited executive branch employees from engaging in any activity, paid or unpaid, that was "not compatible with the full and proper discharge" of their governmental duties; from accepting compensation that might create the appearance of a conflict; and from using government equipment or nonpublic information in the course of their activities. *See* 5 C.F.R. 735.203-735.206 (1990 ed.).[1]

2. On November 30, 1989, Congress passed the Ethics Reform Act of 1989 (Pub. L. No. 101-194, 103 Stat. 1716) amending the Ethics in Government Act of 1978. The relevant provisions, which took effect January 1, 1991, provided that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. app. 501(b).[2] Although an "honorarium" is generally considered to mean a payment that is made where none is expected,[3] Congress de-

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[1] These regulations were replaced, effective February 3, 1993, with comprehensive standards of ethical conduct for employees of the executive branch. 5 C.F.R. 2635, *et seq.* (1993 ed.) *See* discussion *infra* at 7 & n.6, 30 & n.22.

[2] The prohibition is enforceable through a civil action brought by the Attorney General, who may seek a civil penalty of not more than $10,000 or the amount of compensation received, whichever is greater. 5 U.S.C. app. 504(a). In addition, an employee who violates the prohibition may be subject to disciplinary or corrective action, up to and including removal. 5 C.F.R. 2636.104(b), Pet. App. 118a.

[3] *See* American Heritage Dictionary, Second College Edition (1985) ("honorarium" commonly connotes payment "for services for which fees are not legally or traditionally required").

fined the term to include *any* "payment of money or any thing of value for an appearance, speech or article . . . by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative)." 5 U.S.C. app. 505(3) (Supp. I 1989).

The prohibition on acceptance of "honoraria" was originally applicable to all officers and employees of the executive and judicial branches, and to members of the House of Representatives and their staff, but not to Senators and their staff. 5 U.S.C. app. 505(1), (2). By regulation issued by the Office of Government Ethics ("OGE"), officers but not enlisted members of the uniformed services, as defined in 5 U.S.C. 2101(3), are covered by the ban. 5 C.F.R. 2636.102(c), Pet. App. 115a. Except for "special government employees" as defined in 18 U.S.C. 202, and the President and Vice President, all other officers and employees of the executive branch are covered, including civilian employees at the very lowest grades. *Id.*

The prohibitions relating to honoraria and limitations on outside income were coupled with a 25-percent pay increase for members of the House, the judiciary, and senior political appointees within the executive branch. Pub. L. No. 101-194, Title VII, Sec. 703, codified at 5 U.S.C. 5318 note. The Senate (which had elected not to receive the pay increase at that time) and its staff were initially allowed to continue to receive "honoraria."[4] Pub. L. No. 101-194, Title XI, Sec. 1101, codified at 5 U.S.C. 5305 note. Lower graded executive branch employees did not receive the pay increase but were still prohibited from receiving "honoraria."

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[4] In the Congressional Operations Appropriations Act of 1991, Congress extended both the ban on receipt of honoraria and the accompanying pay increase to Senators and their staff. Pub. L. No. 102-90, Tit. I, Sec. 6(b)(2), 105 Stat. 450, 5 U.S.C. 5318 note.

The Congressional Operations Appropriations Act of 1991 amended Section 505 of the Ethics Reform Act to deal specifically with series of appearances, speeches, or articles. Pub. L. No. 102-90, Tit. III, Sec. 314(b), 105 Stat. 469. Effective January 1, 1992, the definition of "honorarium" reads as follows:

> The term "honorarium" means a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative). . . .

5 U.S.C. app. 505(3) (Supp. IV 1992).

3. OGE has issued regulations defining the statutory terms "appearance," "speech," and "article." 5 C.F.R. 2636.203(b), (c), (d), Pet. App. 124a-125a. "Appearance" is broadly defined as attendance at any public or private gathering and "incidental conversation or remarks," but excludes "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." *Id.* at 2636.203(b). A "speech" is any "oral presentation," excluding the "recitation of scripted material" or a "performance," and further excluding "the conduct of worship services or religious ceremonies." *Id.* at 2636.203(c).[5] Finally, an "article" is a writing "other than a book or a chapter of a book," published in a "journal, newspaper, magazine or similar collection of writings," except for "works of fiction, poetry, lyrics, or script." *Id.* at 2636.203(d).

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[5] However, the definition of speech does include "a talk on theology given to other ministers, . . . offering a prayer at the opening of a convention or . . . delivering a sermon during a worship service conducted by another minister." 5 C.F.R. 2636.203(c), example 3; Pet. App. 125a.

OGE has also promulgated a regulatory definition of "honorarium." 5 C.F.R. 2636.203(a), Pet. App. 120a. In addition to excluding "actual and necessary travel expenses" from "honorarium," as provided by statute, OGE has created a regulatory exception for "actual expenses in the nature of typing, editing and reproduction costs." *Id.* at 2636.203(a)(5). It has also exempted compensation received under a "usual employee compensation plan" for services "on a continuing basis" or for the teaching of a course "with multiple presentations" as part of certain kinds of programs or the curriculum of "an institution of higher education." *Id.* at 2636.203 (7)-(9).

OGE added yet a further exception in response to Congress' 1991 amendment of the definition of "honorarium," which, as noted *supra*, changed the definition to specifically include payments for a series of appearances, speeches, or articles, where related to the individual's official duties. Reasoning that the amendment created an exception for compensation for a series of appearances, speeches, or articles that were *not* related to official duties (57 Fed. Reg. 601 (January 8, 1992)), OGE amended 5 C.F.R. 2636 to allow

> [p]ayment for a series of three or more different but related appearances, speeches or articles, provided that the subject matter is not directly related to the employee's official duties and that the payment is not made because of the employee's status with the Government.

Id. at 2636.203(a)(13), Pet. App. 122a.

In short, the statutory ban resulted in significant changes to the scheme of ethical standards to which career employees are subject. For the first time, the government-wide regulations included highly complex restrictions that were applicable only to employees' off-duty writing and speaking. Receipt of compensation for covered forms of free-lance writing and speaking became subject to a flat ban. At the same time, government-wide ethical standards left career employees free to accept compensation for any form of off-duty activity *other than* making appearances, giving speeches, or writing articles, where the activity did not conflict with their official duties (5 C.F.R. 2635.802) or otherwise involve misuse of their governmental position. *Id.* at 2635.701, *et seq.*[6]

B. The Instant Challenge and the Impact of the "Honoraria" Ban on Respondents

Shortly before the effective date of Section 501(b), two federal employee unions and several individual career executive branch employees commenced actions (which were later consolidated) in the United States District Court for the District of Columbia, challenging the constitutionality of the ban on receipt of compensation for expressive activity and seeking injunctive relief. The National Treasury Employees Union was certified as the class representative of all executive branch employees below the grade of GS-16 who would receive "honoraria" but for the prohibitions of Section 501(b). J.A. 124-25.

The individual respondents are full-time career executive branch employees, all but one of whom are below the grade of GS-16,[7] who had written or spoken for valuable consideration on their own time and using their own resources prior to the effective date of the Act. Pet. App. 60a-61a & n.1. They include, among others, Peter G. Crane, a Nuclear Regulatory Commission attorney who was working on articles on Russian history; Charles E. Fager, a mailhandler who wrote and spoke about the

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[6] The latter ethical standard prohibits use of public office by career employees for private gain and use of nonpublic information, government property, or official time in the conduct of the outside activity. *Id.* at 2635.702-705.

[7] Respondent Crane is a GS-16 attorney with the Nuclear Regulatory Commission. J.A. 207.

Quaker religion; William H. Feyer, a Department of Labor attorney who delivered lectures on Judaism; Jan Adams Grant, an Internal Revenue Service employee who wrote articles on environmental topics and spoke on earthquake preparedness; and George J. Jackson, a microbiologist with the Food and Drug Administration who wrote about the art of dance for magazines and newspapers. J.A. 38-41, 47-48, 49-51, 67-71, 77-79.

Because respondents' free-lance writing and speaking created neither a real nor apparent conflict with their federal jobs, they engaged in those activities consistent with the laws and regulations then in force. Following the enactment of the ban, however, respondents were forced to curtail, and in some cases to cease, their writing and speaking activity. J.A. 45-46, 64-66, 88, 132-35, 183-85.

Many of the respondent writers and speakers simply could not afford to continue without receiving compensation for their work because they incur substantial capital expenses as well as research and travel expenses that are not recoverable under the ban.[8] Many also lost incentive to engage in their writing or speaking because the

[8] Respondents' non-recoverable capital expenses include the purchase of word processing equipment and software, research tools, professional books, subscriptions to publications, and specialized equipment; maintenance of professional memberships; and maintenance of home offices. J.A. 132, 45-46, 56. They also often have expenses over and above those recoverable under OGE regulations, in particular those not directly attributable to a particular article or speech. J.A. 45-46, 65, 88, 174-75.

In addition, because the employees could be spending their available nonwork time engaged in other activity for which they could lawfully accept compensation, time spent in writing or speaking represents lost income. The ban has tax consequences as well: employees may deduct their related expenses on their tax returns only if they are "business expenses." The effect of the ban on acceptance of compensation is to reduce free-lance activity to the status of a non-profit "hobby," and related expenses become nondeductible. J.A. 80, 87-88, 184.

compensation they had received for their time, money and effort had served as a strong motivating factor. J.A. 44, 48, 51, 56, 184-85, 74-75, 83-86, 119-20. Finally, for some, constraints imposed by outside organizations precluded them from continuing their writing or speaking on an unpaid basis. Some publishers refuse to publish articles without paying for them, and some professional associations strongly discourage or prohibit their members from writing without compensation. J.A. 78, 83, 118.

C. The Decisions of the Lower Courts

1. The district court granted summary judgment in favor of the plaintiffs. Pet. App. 78a. Applying the teachings of *Simon & Schuster, Inc. v. New York State Crime Victims' Board*, 502 U.S. 105, 112 S. Ct. 501 (1991), the court held that the prohibition at issue directly burdened plaintiffs' First Amendment right of free speech by acting as a financial disincentive to constitutionally protected expressive activity. Pet. App. 63a-64a.

The court concluded that the "honoraria" ban was unconstitutionally over-inclusive because—although ostensibly intended to eliminate the possibility of official corruption—it proscribed compensation "even when there is neither the possibility nor a perception that the office and the payment are interdependent." Pet. App. 70a. The ban was also under-inclusive, the district court determined, because it singled out "appearances, speeches, and articles," while permitting payment for a "myriad" of other forms of expression "on the same subject, from the same supplicant in quest of the same government favor." Pet. App. 70a. *See also id.* at 73a.

As relief, the court struck down the honoraria ban as applied to executive branch employees, while leaving it intact as applied to the legislative and judicial branches. Pet. App. 78a. Finding that the focus of congressional concern was the correction of perceived abuses in receipt

of honoraria by Members of Congress themselves, the court concluded that Congress would have enacted the provision even without the extension of the ban to all federal employees. *Id.* at 73a-78a.

2. The court of appeals affirmed in a 2-1 decision. Pet. App. 1a-58a. Applying the test articulated in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), the Court (per Williams and Randolph, JJ.) concluded that Section 501(b) violates the First Amendment right of federal employees because it restricts substantially more speech than necessary to serve the governmental interest in avoiding impropriety or the appearance of impropriety. Pet. App. 3a-14a.

The court observed that "there would have to be some sort of nexus between the employee's job and either the subject matter of the expression or the character of the payor" in order to create "the sort of impropriety or appearance of impropriety at which the statute is evidently aimed." Pet. App. 9a. The ban in Section 501(b), however, reached much activity with "no nexus to government work that could give rise to the slightest concern." *Id.* at 10a.

The "excess sweep" of the ban, the court observed, could not be justified as a "prophylactic" measure. Pet. App. 11a-14a. As the court pointed out, there was no showing of improprieties that would be remedied by the ban "but not by prior regulations" or of "any serious enforcement or line-drawing costs associated with those regulations." *Id.* at 11a. Further, the court found, there was no suggestion of any actual public perception of a risk of corruption in the receipt of compensation by low-level government employees for speech unrelated to their duties to audiences that are equally unrelated. *Id.* at 13a.

Addressing the proper remedy, the court applied the settled principle that it should "refrain from invalidating more of the statute than is necessary." Pet. App. 14a

(citation omitted). The court therefore left Section 501(b) intact as applied to the legislative and judicial branches and invalidated it as applied to the executive branch. *Id.* at 14a-18a.

The court declined to modify Section 501(b) so as to preserve a ban on compensation when there was an "appropriate nexus" between the employee's job and the appearance, speech, or article; it believed the articulation of such a test to be "a purely legislative act." Pet. App. 14a. Finding no "construction that would trim off all or even most of the invalid applications to executive branch employees," the court held the section unconstitutional as applied to that branch. *Id.*[9]

Over the dissents of Judges Sentelle and Silberman, the court of appeals denied the government's petition for rehearing and suggestion for rehearing en banc. Pet. App. 79a-81a.

SUMMARY OF ARGUMENT

I. Section 501(b) of the Ethics Reform Act—the "honoraria" ban—prohibits any of the three million civilian executive branch employees from accepting any compensation for off-duty articles, speeches, or appearances, regardless of their subject matter or the identity of the payor. Section 501(b) both focuses its financial burden only on speech (as opposed to other income-producing activities) and sweeps broadly, encompassing a wide range of arbitrarily selected expressive activities, from drama reviews to religious lectures.

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[9] Judge Sentelle, in dissent, argued that the majority had erred in treating this case as a facial, rather than as-applied challenge to Section 501(b) (Pet. App. at 20a-30a) and also that the ban was sufficiently "narrowly tailored," even without a job nexus. *Id.* at 30a-52a. Judge Sentelle also took issue with the majority's mode of severance (*id.* at 52a-57a) because he believed that its conclusions regarding the ban's facial invalidity should have led it to strike down the ban as to all "officers and employees," leaving it in place only with respect to Members of Congress. *Id.* at 57a.

A. There can be no doubt that the ban implicates serious First Amendment concerns both by singling out and penalizing certain forms of speech, and by making it more expensive and thus more difficult for employees to engage in covered forms of expressive activity. The ban has reduced and in many cases eliminated any incentive to write articles or speak publicly. Under settled precedent of this Court, such a restriction targeting speech significantly burdens the exercise of First Amendment rights.

B. The constitutionality of restrictions on the speech of public employees is traditionally measured by the balancing test set forth in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), which seeks to accommodate "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. Under that case and its progeny, where the government imposes burdens on the off-duty, nonwork-related speech of its employees, it must make a strong showing that its interest in promoting governmental efficiency is threatened and that its restriction on speech is no broader than is reasonably necessary to protect its interests.

The government's persistent attempts to derive a more deferential standard of review from *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), are unavailing. If anything, the ban's singling out of speech for regulation suggests that the application of a more rigorous standard of review than usually governs in the public employment context is appropriate. *See Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). But in any case, subsequent precedent of this Court undermines the government's effort to use *Mitchell* to skew the *Pickering* balance in its favor.

C. Under any meaningful standard of scrutiny, Section 501(b) is unconstitutional. The ban both singles out

compensation for expressive activity without adequate justification and encroaches upon far more speech than may reasonably be considered necessary to protect the asserted interest in government integrity. In fact, the ban's irrational scope and lack of any real or perceived justification have actually led to the undermining of the credibility of government ethical standards in general, in the view of administration officials and numerous experts.

The government has not shown that speech by career executive branch employees with no nexus to government employment raises any actual or apparent impropriety. It points to no history of abuse from employees' receipt of "honoraria" or to any expressed congressional concern about such activity. Congress' focus, as even the government admits, was on the potential for abuse in the receipt of honoraria, as traditionally defined, by Members of Congress from special interest groups. The reports cited by the government as the basis for the enactment of the ban merely recommended an extension to all three branches of a prohibition on acceptance of the type of honoraria historically subject to abuse.

The government has similarly failed to justify the ban as a prophylactic measure necessary to avoid a risk of circumvention or the administrative difficulties of a narrower ban. The ban is, first, not even a genuine "prophylactic" measure, for it is riddled with exceptions and exclusions. Second, there has been no showing of significant enforcement problems with prior regulations and certainly no showing that the ban with its odd permutations would be any easier to administer. But finally, and most importantly, the government has not shown that a ban of this breadth is necessary to meet a serious problem of abuse, as is required of prophylactic rules affecting First Amendment rights. The government's speculation concerning what Congress "could have" thought that the public "could have" considered a threat is not sufficient justification under any of this Court's current jurispru-

dence, including the Hatch Act cases. In fact, the absence of any clearly articulated need for the ban—any documented potential for abuse or history of congressional or public concern—stands in sharp contrast to the well-documented record supporting the Hatch Act.

II. While adherence to the precise remedial formulation adopted by the court below is not crucial to the vindication of respondents' First Amendment rights, the remedy the court of appeals fashioned, contrary to the government's arguments, was appropriate and consistent with this Court's jurisprudence. The court properly invalidated Section 501(b) insofar as it limited the speech of executive branch employees—those as to whom a constitutional defect had been shown—while leaving intact those applications to other branches that had not been challenged and that raise "quite different considerations." Pet. App. 14a.

There is no merit to the government's argument that the court of appeals was required to identify and define the circumstances in which there would exist a constitutionally adequate "nexus" between the subject matter of the expression or the character of the payor, and devise a remedy on that basis. As the court of appeals recognized, the drafting of an appropriate nexus test—one that prohibits receipt of compensation only where it would create a real or apparent conflict with federal employment—is a task more properly left to Congress.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT THE HONORARIA BAN VIOLATES THE FIRST AMENDMENT AND CRAFTED A REMEDY APPROPRIATE TO THE VIOLATION IT FOUND

I. The Ban on Compensation Significantly Interferes With the Exercise of First Amendment Rights by Singling Out Expressive Activities for a Discriminatory Financial Burden

Section 501(b) of the Ethics Reform Act prohibits acceptance of compensation—termed an "honorarium"—for any "appearance, speech or article." It thus forbids career government employees from accepting any payment for a broad range of expressive activity, from political commentary to scholarly opinion, from drama reviews to religious thought. The expression subject to the ban undeniably addresses matters of "public concern." It is the kind of speech, moreover, that has historically enriched the literary life of this country.[10]

A. *Economic Burdens on Speech Like Those Imposed by the "Honoraria" Ban Raise Serious First Amendment Concerns*

It is by now beyond dispute that an economic burden imposed on speech raises serious constitutional concerns. This Court in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 112 S. Ct.

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[10] There is an important historical tradition of federal government workers who were writers in their spare time. Nathaniel Hawthorne and Herman Melville worked for the Customs Service; Washington Irving served in the diplomatic corps; Bret Harte worked for the Mint; and Walt Whitman was an employee of the Justice Department. More recently, Lewis B. Puller, Jr., was an employee of the Department of Defense who gave speeches in his off-duty time about his Pulitzer Prize-winning autobiography, *Fortunate Son*, and his experiences in the Vietnam War. Until the lower court entered its order in this case, Puller was barred from accepting compensation for his speeches.

501 (1991), dispelled what the district court here termed "[a]ny lingering uncertainty" as to whether a law operating as a financial disincentive can offend the Constitution where the speaker "remain[s] at liberty to speak for free." Pet. App. 63a, 64a. It held that a regulation denying payments to an author directly burdens both his right of free speech and that of his publisher. 112 S. Ct. at 508, 509.

The Court's conclusion in *Simon & Schuster* is the logical culmination of an unbroken line of cases recognizing that financial or economic restrictions imposed on speech directly burden freedom of expression. *See Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789 n.5, 790 (1988), *and Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967 & n.16 (1984) (finding unconstitutional various restrictions on the amount of money charities can spend to solicit contributions).[11] As those cases confirm, regulations that impose economic constraints on expressive activity—by making it more onerous or expensive or by removing financial incentives to engage in it—significantly restrict the exercise of First Amendment rights.

Under these principles, it is clear that Section 501(b) implicates serious First Amendment concerns. Because it flatly prohibits employees from accepting compensation for numerous forms of expression, beyond reimbursement for some expenses, the ban makes it more expensive, and hence more difficult, for employees to engage in First Amendment activity. Moreover, Section 501(b), like the statute in *Simon & Schuster*, saps incentive to write articles or speak publicly by denying any profit from those activities. Echoing the maxim that "No man but a blockhead ever wrote except for money" (Boswell, *Life of Johnson*, April 5, 1776), the Second Circuit has aptly

[11] *See also Meyer v. Grant*, 486 U.S. 414, 422-24 (1988); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

observed that "[w]ithout a financial incentive . . ., most would-be story-tellers will decline to speak or write." *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 781 (2d Cir. 1990), *aff'd in pertinent part*, 502 U.S. 105 (1991).[12]

B. *The Burden on First Amendment Rights Is Compounded by the Fact that the Ban Targets Only Compensation for Expressive Activity*

1. Under this Court's jurisprudence, the burden the ban imposes is significantly compounded by the fact that it targets and singles out speech for disfavored treatment. There can be no doubt that financial restrictions that target and single out speech for discriminatory treatment raise the most serious First Amendment concerns. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-31 (1987) (rejecting a tax targeting a particular category of magazine, while exempting newspapers and other types of journals); *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (rejecting tax that singled out publications for unique treatment and targeted a small group of newspapers). *See also Turner Broadcasting Sys., Inc. v. FCC*, 62 U.S.L.W. 4647, 4652 (S. Ct. June 27, 1994). Differential treatment of speech merits especially close scrutiny,

[12] The decreased willingness or ability of federal employees to produce publishable material also affects both publishers who would disseminate their message and the audiences who will be deprived of their message. That impediment to the dissemination of information implicates serious First Amendment concerns under well-established principles. *See Meyer v. Grant*, 486 U.S. at 420-425 (finding unconstitutional restrictions that limited the ability of individuals or organizations to pay others to circulate their message). The impact of Section 501(b) on the dissemination of information is demonstrated in the record of this case. Respondent NTEU Chapter 143 can no longer publish its newsletter because the individual it had paid to write articles for that newsletter—a government employee—refuses to continue writing without compensation. J.A. 58-62, 181-82.

this Court has observed, because "unless justified by some special characteristic" it may "sugges[t] that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star*, 460 U.S. at 585.

Irrespective of whether Congress was motivated by such a goal here,[13] there is no dispute that the ban affords speech differential treatment. Employees who write articles or deliver speeches are prohibited from receiving payment even if their employing agency has already determined that it would present no real or apparent conflict of interest under applicable governmental standards. *See* 5 C.F.R. 2635.807. At the same time, career employees remain at liberty to accept compensation for other forms of outside activity that similarly present no conflict of interest. *See id.* at 2635.802.

Moreover, although "honoraria" had been the object of abuse by Members of Congress and other high level government officials, as we show in greater detail *infra* at 31-32, there is no characteristic to the writing and speaking activities of career employees that makes them "special" (*see Minneapolis Star*, 460 U.S. at 585) when compared to other outside income-producing activities. Thus, the fact that the ban singles out expression raises unique First Amendment concerns.

2. Further, Section 501(b) forbids payment only for *certain* kinds of expressive activity. *See Simon & Schuster*, 112 S. Ct. at 512 (law singled out speech on a particular subject for a burden not imposed on other speech or activities). As a result of the implementing regulations, a host of exceptions and fine distinctions, many arguably content-based, have been introduced into the government-wide scheme.

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[13] *See Minneapolis Star*, 460 U.S. at 592-93 (explaining that actual legislative motives are not crucial to the constitutional analysis); *Arkansas Writers' Project*, 481 U.S. at 228 (same).

Thus, the ban extends to nonfictional articles but not to works of fiction, poetry, lyrics or script. 5 C.F.R. 2636.203(d). For nonfictional works, the form of publication is determinative: "books" and "chapters" of books are excluded from coverage, but any work deemed to be a single or two-part "article" is covered, regardless of length. *Id.*[14] A public appearance is covered, unless it constitutes a "performance" involving artistic, athletic or other such talent. *Id.* at 2636.203(b). A "speech" is expansively defined as an "oral presentation" but does not encompass recitations of scripted material or sermons. *Id.* at 2636.203(c).

Consistent with these regulations, an employee may not collect compensation for a speech that happens to be funny, but may be paid for a comic performance. A religious talk would be covered by the ban, but not a sermon delivered at a worship service (unless it was delivered by a "visiting" minister). A modern Thoreau could receive no fee for an essay on nature, but a modern Whitman could be paid for his blank verse. Plaintiff Crane could be fined or fired if he received payment for his "op-ed" piece in *The Washington Post* criticizing the honoraria ban (J.A. 40), but not if he were paid by *The National Enquirer* to invent a story about octogenarian women giving birth.

As Justice Holmes long ago observed, acting as a literary critic is "a dangerous undertaking for persons trained only to the law." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). OGE will have to make such literary judgments, for the distinctions drawn in its regulations may require an analysis of the nature of the expression to determine its fictional or

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[14] The regulations do not discuss pamphlets, tracts or brochures or reprints of works that first appeared in article form in a magazine. They do not define "book" or set any standards as to its length or publishing format.

artistic quotient. The line between poetry and prose can be subtle; even the distinction between fact and fiction can be a fine one, with certain kinds of expression defying categorization.[15]

Further, while the ban singles out certain forms of communication, it leaves employees free to accept compensation from the very same payor, for the very same message, if they package the material differently—as a three-part series or a book, for example—or if they choose a different literary form, such as poetry, fiction, or a dramatic presentation. As a result, employees will inevitably channel their off-duty activities into certain preferred media, such as books (*see, e.g.*, J.A. 75) or certain literary forms, such as fiction, thereby "distort[ing] the market for ideas." *Leathers v. Medlock*, 499 U.S. 439, 448 (1991). In any event, the fact that the ban not only targets speech, but discriminates among forms of speech, further compounds the burden it imposes on the exercise of First Amendment rights.

C. *The Government's Argument that the Ban Only Minimally Impairs the Exercise of First Amendment Rights Is Meritless*

Despite the foregoing, the government characterizes the ban's burden on the exercise of First Amendment rights as "minimal" or "relatively modest." *See* Pet. Br. 15-17. The government's contention is based upon an

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[15] Certain religious writings could be deemed factual accounts of historical truths (covered), mystical or poetical literature (not covered), or ethical teachings (possibly covered), depending on one's perspective. An article-length work could be fact or fiction depending on the degree of historical accuracy or literary license exercised by the author in his or her use of current or historical events. A satire, allegory, or parable could be a writer's attempt to use the fictional format to comment on current affairs. *Cf. Winters v. New York*, 333 U.S. 507, 510 (1948) ("Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.")

approach that is both incorrect as a matter of law and factually inaccurate.

a. First, the government's argument entirely ignores the discriminatory nature of the burden the ban imposes. It does not mention the relative burdens on speech and nonspeech activities. In fact, it goes so far as to portray the disparate impact on various forms of speech activities as a *positive* feature of the ban, allegedly illustrating its modest impact. This is, in itself, a serious distortion of First Amendment jurisprudence.[16]

Moreover, the government misstates the burden the ban imposes on the exercise of First Amendment rights by focusing solely on its asserted financial impact on individual employees. *See* Pet. Br. 17 (declaring burden is not "severe" where individual employees are not financially dependent on their outside earnings). In *Simon & Schuster*, this Court recognized that prohibiting authors from receiving income from books concerning their crimes was a direct and serious burden on speech because of its undoubted effect in reducing the overall quantity of speech produced. 112 S. Ct. at 508-09. The Court did not deem it necessary to delve into the degree to which individual authors would be discouraged from writing; indeed, it observed that some works "would have been written without compensation." *Id.* at 511.

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[16] The First Amendment does not permit restriction of one form of expression simply because another form is available. An individual has the right to select his medium; no one should be forced, for example, to transform a speech into a rap in order to transmit his message and also receive compensation for his effort. *See United States v. Grace*, 461 U.S. 171, 181 & n.10 (1983) (finding unconstitutional a statute banning some forms of expressive conduct on public sidewalks although it had been interpreted to permit other expressive conduct). *Cf. Arkansas Writers' Project*, 481 U.S. at 231 (burden on speech not alleviated by exemption for other forms of media).

Consistent with the First Amendment's "core value"—promoting "free and unhindered debate on matters of public importance" [17]—the key factor in *Simon & Schuster*, as in *Meyer v. Grant* and *Riley*, *supra*, was the statute's reduction of the overall quantity of speech in society. Indeed, in *Riley*, the Court flatly rejected the contention—similar to that advanced here—that financial restrictions on speech operated as only a minimal burden on speech. 487 U.S. at 787-90 & n.5. Because the ban has the "inevitable effect of reducing the total quantum of speech" on public issues (*Meyer*, 486 U.S. at 423), it operates as a matter of law as a serious burden on the exercise of First Amendment rights, irrespective of its idiosyncratic consequences for particular individuals.

b. In any event, the uncontradicted record here shows that the ban in fact had a significant adverse effect upon many individual employees' expressive activities. As set forth *supra* at 8-9, Section 501(b) had the practical effect of forcing some of the respondents to cease their free-lance writing or speaking entirely, and compelled others to curtail it. Still others continued to write or speak only in the expectation of legislative or judicial relief from the effect of the ban. *See, e.g.*, J.A. 45-46, 50, 64-66, 83-84, 88, 132-35, 183-85.

In short, while some of the respondents could continue to write and speak in the short-term, the "foreseeable long-term effect" would be to reduce or eliminate their willingness to write and speak. *NTEU v. United States*, 927 F.2d 1253, 1255 (D.C. Cir. 1991).[18] Accordingly,

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[17] *Pickering*, 391 U.S. at 573.

[18] The government cites a statement in *NTEU v. United States*, 927 F.2d at 1255, that the statutory and regulatory provisions, fairly read, "encompass all of the necessary expenses" incurred by employees. Pet. Br. 16 n.18. That observation was made in affirming the denial of a preliminary injunction. Evidence adduced in the subsequent proceedings on summary judgment more fully established the nature of the expenses incurred by plaintiffs and

the government's effort to trivialize the impact of the ban on individual federal employees and on the exercise of First Amendment rights is unpersuasive.

II. The Ban Is Unconstitutional Because It Singles Out Speech Without Adequate Justification and Restricts More Speech Than Reasonably Necessary To Advance the Government's Asserted Interests

A. *The Government Bears the Burden of Providing an Adequate Justification for Financial Restrictions that Target Speech by Public Employees*

1. For nearly three decades, it has been firmly established that public employees have an interest in freedom of speech that is protected by the First Amendment. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *see also Rankin v. McPherson*, 483 U.S. 378, 383 (1987); *Connick v. Myers*, 461 U.S. 138, 145-47 (1983); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Public employees share with other citizens a right to debate issues of "political, social, or other concern to the community." *Connick*, 461 U.S. at 146. Moreover, affording constitutional protection to the speech of public employees fosters "the *public* interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment." *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968) (emphasis added).

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revealed that recovery of significant expenses would not be allowed by those provisions.

Thus, contrary to the government's claim that employees have the right to recoup "many" of their related expenses (*id.* at 16), the record established that employees typically incur significant non-compensable capital expenses, such as the purchase of computer equipment or the maintenance of professional libraries. J.A. 132, 45-46. In addition, they often have "actual" expenses beyond those permitted by a reasonable reading of the statute or regulations. J.A. 45-46, 65, 88, 174-75.

At the same time, the Court has recognized the government has "interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of speech of the citizenry in general." *Pickering*, 391 U.S. at 568. To protect its interest as an employer "in achieving its goals as effectively and as efficiently as possible," the government may restrict its employees' speech to a greater extent than it may, as sovereign, regulate the speech of the public at large. *Waters v. Churchill*, 62 U.S.L.W. 4397, 4401 (S. Ct. May 31, 1994) (plurality opinion). In each case, therefore, the Court endeavors to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

In striking the balance, the weight and nature of the government's burden may vary, depending on the character of the employee's expression. *Connick*, 461 U.S. at 150. Where, as in *Connick*, the employee's speech both occurs on-duty and "touch[es] upon matters of public concern only in a most limited sense" (*id.* at 154), the government need show only a "reasonable belief" that the speech would interfere with efficient office operations. *Id.* at 151-52. By contrast, where the speech more substantially involves a matter of public concern, the Court has "caution[ed] that a stronger showing may be necessary." *Id.* at 152. *Accord, Waters v. Churchill*, 62 U.S.L.W. at 4401 (where employee speech substantially involves matters of public concern, "the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished").[19]

[19] *See also Rankin*, 483 U.S. at 388-89 (noting "no evidence that [statement] interfered with the efficient functioning of the office"); *Pickering*, 391 U.S. at 567, 570-73 (statements "neither shown nor can be presumed" to have impeded teacher's performance or interfered with school's operation). *Accord Jeffries v. Harleston*, 21 F.3d 1238, 1246 (2d Cir. 1994) (if speech "substantially addressed" public issues, government must show statements "actually undermined the effective and efficient operation" of school); *Hyland v. Wonder*, 972 F.2d 1129, 1139-40 (9th Cir. 1992) (stating that "[t]he more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made," the court required a showing of actual, material, and substantial disruption); *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991) ("[t]he more central a matter of public concern is to the speech at issue, the stronger the employer's showing of counter-balancing governmental interest must be"); *Schalk v. Gallemore*, 906 F.2d 491, 496 (10th Cir. 1990) (requiring evidence of actual disruption of services resulting from speech on matter of public concern); *American Postal Workers Union v. United States Postal Serv.*, 830 F.2d 294, 303-04 (D.C. Cir. 1987) (same).

In short, the Court's jurisprudence permits the government greater latitude in regulating the speech of public employees than the speech of citizens in general. Nonetheless, where, as here, the affected government employees are engaging in speech of unquestioned public concern on their own time, with no connection to their status as government employees, the government must bear some meaningful burden of justification. At a minimum, the government must show its restriction is no broader than is "reasonably necessary" to protect its substantial interest. *See Brown v. Glines*, 444 U.S. 348, 355 (1980); *see also United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (ban on certain partisan political activity by federal employees was not "fatally overbroad" (*id.* at 580) and was supported by "obviously important" government interests (*id.* at 564)); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding challenge to state statute regulating political activity by state employees where not substantially overbroad).

This requirement—that there be a reasonable "fit" between the asserted legislative objective and the means chosen to achieve that objective—does not equate to the application of a "rigid" "narrow tailoring" test, as the

government suggests (Pet. Br. 24 n.21). Rather, as Judge Williams observed below (Pet. App. 87a), the requirement of an adequate fit between the means and the ends is an inherent component of the *Pickering* balancing test, for "if the burden on speech is greater than is appropriate to achieve the government's end . . . it is hard to see what interest justifies the excess burdens."

2. In its brief, the government repeatedly repairs to a highly deferential formulation of the standard of review that it purports to derive from language this Court used over half a century ago in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). It urges that under *Mitchell*, "speculative" assertions of harm to a government interest can be used to demonstrate the reasonableness of Congress' judgment when it imposes burdens on employee speech. *See* Pet. Br. 14, quoting 330 U.S. at 101; *see also id.* at 18, 25, 27, 29, 30-31. This contention is unavailing.

First, if anything, Congress' seemingly cavalier decision to cover career employees (*see infra* at 31-36), and the ban's discriminatory impact on speech, suggest that the standard of review should be *more* and not *less* rigorous than that usually applied in the public employment context. In the more typical case examining the reasonableness of an employment-related restriction on speech, the government employer makes the reasons for the restriction clear and can mount at least a credible effort to show that the speech is somehow disruptive to the effective functioning of the workplace. In such cases, even though the speech is protected by the First Amendment, the restriction may be permissible because the government, like any employer, is entitled to protect its interest in the effective functioning of the workplace, whether it is threatened by speech or by some other conduct. *See Waters*, 62 U.S.L.W. at 4400.

The honoraria ban does not fit readily within the *Pickering* paradigm. Here, for reasons that can most charitably be termed "unclear," the government employer is singling out employees' off-duty nonwork-related speech for adverse treatment while not penalizing other, non-speech activities that could have an equal potential to disrupt its interests as an employer. As noted *supra*, this Court has recognized that regulations that so target speech raise special concerns and so merit special scrutiny. *See Minneapolis Star, supra*; *see also Turner Broadcasting Sys., Inc. v. FCC*, 62 U.S.L.W. at 4652. These concerns are no less applicable when the speech the government is targeting happens to be that of its own employees, and suggest that this case can be resolved without resort to the *Pickering* formulation.

In any event, there is no merit to the government's argument that *Mitchell* renders this Court little more than a rubber-stamp for legislative restrictions on the exercise of First Amendment rights by public employees. As this Court has observed, *Mitchell* was decided when the Court embraced the now-rejected view that a public employee has no right to object to even unconstitutional conditions placed on the terms of employment. *Connick*, 461 U.S. at 143-44. *Mitchell*'s language averting to what Congress "may have concluded" or "may have thought" (Pet. Br. 27, quoting 330 U.S. at 101, 102) must be read in light of subsequent decisions that "cast new light" on the scope of public employee rights. *Connick*, 461 U.S. at 144.[20]

As the court of appeals recognized, under those decisions—*Pickering* and its progeny—the proper inquiry in this case is whether the governmental interests are in fact substantial and whether the ban limits more speech than is reasonably necessary to advance those substantial

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[20] While *Mitchell*'s result was confirmed in *Letter Carriers*, the Court there undertook a far more searching inquiry into the historical justifications for the Hatch Act (413 U.S. at 557-63, 565-66), and went to some pains to construe the statute to avoid overbreadth problems. *Id.* at 571-81.

interests. As we now show, the ban must be ruled unconstitutional, measured by that or any meaningful standard.

B. *The Government Has Failed to Justify the Ban's Discriminatory Impact on Speech or Show that the Ban Is Reasonably Necessary to Avoid Real or Apparent Conflicts of Interest in the Career Civil Service*

The government proffers three interests in justification of the broad scope of Section 501(b): an interest in promoting the integrity of its workforce; the need to avoid the risk of evasion; and an interest in administrative efficiency. Pet. Br. 17-23. The credibility of these rationales is highly suspect—particularly where the ban singles out only speech for financial burden, and not other income-producing activity.[21] Moreover, while the interests the government asserts are important in the abstract, the ban is constitutionally defective because, as the court of appeals discerned, it goes substantially further than is necessary to achieve these objectives.

1. *A government employee's receipt of compensation for off-duty speech with no nexus to his or her job does not give rise to either the reality or appearance of impropriety*

The government's primary stated justification for Section 501(b) is its interest in avoiding actual or apparent impropriety within the federal workforce. The govern-

[21] In place of a persuasive rationale for the ban's disparate treatment of speech, the government repairs to Congress' alleged right to "extrapolate" from its own experience with honoraria and act in *anticipation* of possible future problems. Pet. Br. 29, 31-32. Of course, there is no evidence that Congress was engaging in any such extrapolation here. There is, moreover, no rational basis for the extrapolation the government posits in light of the materially different contexts presented—receipt of "honoraria" by Members of Congress from special interest groups, on the one hand, and receipt of payment by career civil servants for their free-lance writing and speaking, on the other.

ment has failed to show that a ban on receipt of compensation for speech with no connection to employment serves that interest.

a. As we have emphasized, Section 501(b) covers activities unrelated to the employee's government job, where the payor has no interest that might be advanced by the employee, and where the writing and speaking occur on nongovernment-time, without use of government resources. It forbids a microbiologist with the Food and Drug Administration from accepting payment for dance reviews published in *The Washington Post*. J.A. 77-79. It equally precludes an aerospace engineer with the Goddard Space Flight Center from accepting a fee for lecturing on Black History to an audience at the Maryland Institute of Art. J.A. 63.

In neither of these examples, nor in countless others, can a credible argument be made that the employees' conduct threatens *any* government interest, much less a substantial one. As the court of appeals correctly discerned, only compensation for expressive activity that has some connection to the employee's job—either through the subject matter of the activity or the identity of the payor—would create "the sort of impropriety or appearance of impropriety at which the statute is evidently aimed." Pet. App. 9a.

Moreover, the fact that the ban restricts only certain kinds of expression, while permitting compensation for other kinds, as well as for nonspeech activity, greatly undermines the government's rationale for burdening speech in the first place. *See City of Ladue v. Gilleo*, 62 U.S.L.W. 4477, 4480 (S. Ct. June 13, 1994) (under-inclusiveness of a regulation of speech "may diminish the credibility of the government's rationale for restricting speech in the first place"). Indeed, in our view, the ban's under-inclusiveness, which was also pointed out by the district court (Pet. App. 73a), presents a separate ground for finding it unconstitutional.

The court of appeals was correct when it recognized that Section 501(b) reaches much compensation that could not give rise to "the slightest concern." *Id.* In fact, banning such untroubling compensation appears to be the *only* effect of Section 501(b). As we have noted, all executive branch employees are already subject to statutes and regulations that effectively forbid them from engaging in any conduct—paid or unpaid, and expressive or non-expressive—that could give rise to impropriety or the appearance of impropriety.[22] In addition, individual agencies have issued supplemental regulations that are tailored to their particular needs. Accordingly, as independent experts on government ethics,[23] as well as

[22] By regulation, *any* activity by an executive branch employee, including any writing, speaking, or appearances, that "conflicts with an employee's official duties" is prohibited. 5 C.F.R. 2635.802. Acceptance of compensation for teaching, speaking, or writing is specifically prohibited if it "relates to the employee's official duties." *Id.* at 2635.807(a). The regulations further define, in detail, when an activity is deemed to "relate to" the employee's official duties. *Id.* at 2635.807(a)(2)(i). Moreover, as discussed *supra*, n.6, the regulations contain extensive prohibitions on misuse of position, including use of public office for private gain. *Id.* at 2635.701, *et seq.*

Federal statutes, further, prohibit receipt of compensation for government service or supplementation of salary from a private party (18 U.S.C. 209 (1988 & Supp. IV 1992)), as well as solicitation or receipt of bribes (18 U.S.C. 201(b) and (c)).

[23] In a report on government ethics published in 1993, a distinguished Committee on Government Standards, assembled under the auspices of the American Bar Association's Section on Administrative Law and Regulatory Practice, concluded that the "honoraria" ban was counterproductive. Cynthia Farina, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 Admin. L. Rev. 287, 316-22 (Summer 1993). It found that the ban was significantly under- and over-inclusive and sent employees "muddled" signals, thereby forfeiting employees' respect. *Id.* at 320. The statute and regulations, it stated, "demonstrate[] neither a coherent vision of the dangers that would justify such substantial restrictions, nor a careful attempt to focus prohibitions on the activities and the people presenting the greatest risk." *Id.* at 316.

government officials from the Director of OGE through then-President Bush, have recognized,[24] the abrupt introduction of the ban's permutations into this complex regulatory scheme furthers no significant government interest.

b. The legislative history of the Act further belies the government's allegation that ethical concerns are implicated when career employees are compensated for writing or speaking on a subject that has no nexus to their employment from a payor with no business before their agency. On the contrary, it confirms that Congress' major concern was the potential for abuse in the acceptance of honoraria—as traditionally defined—by Members of Congress for speeches to companies or interest groups that might some day seek their assistance.[25] That practice was

It concluded that this sort of restriction "raises serious concerns about whether First Amendment values are being appropriately honored." *Id.* at 317. For further discussion, *see* brief of amicus Public Citizen.

[24] The Director of the Office of Government Ethics—the official charged with administering this statute—has stated that the ban on receipt of "honoraria" by executive branch employees is both unnecessary and "too restrictive." J.A. 122-23. He has testified before Congress that the ban actually thwarts the interests the government articulates, by undermining the credibility of other ethical standards. S. Rep. No. 29, 102d Cong., 1st Sess. 6 (1991). President Bush expressed the same views when he reluctantly signed into law a provision that exempted only a limited group, rather than the whole career workforce as he had urged, from the strictures of the ban. *See infra* at n.34. He declared that the effect of the inappropriately limited amendment is to undermine "the credibility of all the standards to which we ask employees to adhere." Signing Statement, 28 Weekly Comp. Pres. Doc. 2073 (Nov. 2, 1992).

[25] It is that type of abusive practice that the government and amicus Common Cause describe as raising concern among the public and Members of Congress. *See* Pet. Br. 32; CC Br. 6-9, 14-15. Although Common Cause cites to newspaper accounts of impropriety (CC Br. 8 n.10), those focus almost exclusively on abuses by congressional staffers; while one refers to "improper payments" to executive branch officials, it is unclear whether those payments were in the form of "honoraria." The "extensive aca-

widely perceived as a means for special interest groups to gain influence or buy access to Members of Congress, especially given the often significant sums of money involved. *See* Pet. App. 15a-16a, 75a-77a.[26]

The Report of the Bipartisan Task Force on Ethics echoed the same concern that "substantial payments to a Member of Congress for rendering personal services to outside organizations presents [sic] a significant and avoidable potential for conflict of interest." 135 Cong. Rec. H9256 (daily ed. Nov. 21, 1989). The Task Force perceived a need to assure the public that Members were "not using their positions of influence for personal gain." *Id.*

Congress' response was to adopt a comprehensive reform of its compensation system. The House, followed in 1991 by the Senate, banned receipt of honoraria and imposed limits on outside income, coupled with—and conditioned on—acceptance of a 25-percent pay increase. *See* Pub. L. 101-194, Title VI, Sec. 603, 103 Stat. 1763, codified at 2 U.S.C. 31-1 note (providing that the pro-

demic literature" on the "capture" of executive branch officials by regulated interests cited by Common Cause (CC Br. 14-15 & n.27) does not address alleged abuse in the receipt of compensation by career executive branch employees for nonwork-related writing or speaking. Only one (P. Quirk, *Industry Influence in Federal Regulatory Agencies* (1981)) mentions the possibility of abuse in "speaking engagements," and even it does not further explore the issue.

[26] The floor debates addressed almost exclusively the public perception that receipt of honoraria by Members of Congress constituted influence-buying and improper supplementation of salary. No Member discussed any actual abuse or perception of abuse by career government employees or offered any other rationale for including them within the scope of the "honoraria" ban. Virtually all legislative references are to Members of Congress themselves. While there are a few references to senior executive branch officials and the judiciary (*see, e.g.*, 135 Cong. Rec. H8746, H8747 ((daily ed. Nov. 16, 1989) (statement of Rep. Fazio); S15987 (daily ed. Nov. 17, 1989) (statement of Sen. Mitchell)), there is no discussion of abuses by such officials.

hibition on receipt of honoraria will "cease to be effective" if the pay increases were repealed).[27]

The scope of the financial *quid pro quo* roughly mirrored congressional concern about honoraria abuse. Members of Congress, the judiciary, and senior political appointees within the executive branch in positions in the Executive Schedule received the 25-percent increase in exchange for a ban on receipt of honoraria. Career government employees—whose receipt of outside income was not the subject of concern on the part of any Member of Congress—received no pay increase.

Thus, the legislative record does not support the concern the government articulates—that employee acceptance of "honoraria" with no nexus to employment threatens integrity or creates a public perception of impropriety. In fact, the legislative record lacks even a suggestion of congressional concern that such a perception *might* develop in the future. Rather, that record reflects Congress' preoccupation with its own public image, and an at-most derivative concern about abuses by high level government officials in other branches.[28]

[27] The Task Force recommended a 25-percent salary increase as part of a "comprehensive ethics package." 135 Cong. Rec. H9266, H9254 (daily ed. Nov. 21, 1989). *See also Fairness for Our Public Servants: The Report of the 1989 Commission on Executive, Legislative and Judicial Salaries* (Dec. 1988) (*Quadrennial Commission Report*), which focused on the erosion of salary levels and the practice of salary supplementation by Members of Congress who accepted "substantial amounts of 'honoraria' for meeting with interest groups which desire to influence their votes." J.A. 222. *See also* J.A. 228, 232-34. Its recommendation of salary adjustments was contingent on the abolition of honoraria, "effective when the recommended pay increases begin." J.A. 229.

[28] Subsequent history provides good reason to believe that Congress no longer believes the ban as enacted is necessary if, indeed, it ever did. There has been virtually unanimous support in both houses of Congress for measures to amend the statute to eliminate the flat government-wide ban, although passage has been blocked by a single Senator. J.A. 196. *See* discussion of congressional

c. The government places extensive and undue reliance upon the reports of the Quadrennial Commission and the Wilkey Commission. Pet. Br. 19-20. The Quadrennial Commission merely recommended, without any discussion or supporting findings, "that the practice of accepting honoraria in all three branches be terminated by statute." J.A. 234. Importantly, it defined "honoraria" as "payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-governmental group, often one with a material interest in pending or anticipated legislation." J.A. 232-33. Its definition did not include payment for written work, nor did it seem to encompass the receipt of payment from persons or groups not involved in the legislative process.[29]

In addition, the Quadrennial Commission appeared to limit its recommendation to "top" officials of the executive

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action at Pet. App. 90a-92a (Silberman, J., dissenting from the denial of rehearing *en banc*) (noting unanimous Senate support for an amendment); *id.* at 78a n.15 (Jackson, J.).

Both the administration and Common Cause have supported legislation to permit career government employees at any salary level to accept compensation for articles, appearances, or speeches if unrelated to their official duties and if the party offering the payment had no interests that might be substantially affected by the performance or nonperformance of the individual's official duties. J.A. 196; 136 Cong. Rec. S17258 (daily ed. Oct. 26, 1990) (statement of Sen. Glenn excerpting letter from Potts); 137 Cong. Rec. H11,270 (daily ed. Nov. 25, 1991) (statement of Rep. Frank).

Similar legislation was reintroduced in the House on February 24, 1993, as H.R. 1095.

[29] Contrary to the government's suggestion (Pet. Br. 20), the Commission's recommendation that a broader statutory definition of "honoraria" be adopted does not indicate that it contemplated a prohibition of any compensation for all types of appearances, speeches, or articles. Rather, the Commission suggested only a definition that would close loopholes "such as receipt of consulting, professional or similar fees; payments for serving on boards" and other expenses. J.A. 234. These are all categories of payments historically subject to abuse by Members of Congress, rather than career government employees.

and judicial branches, as well as to the legislative branch. Thus, it refers only once to acceptance of honoraria in the executive branch, and then in the context of "top officials." J.A. 222 ("Albeit to a less troubling extent, the practice of accepting honoraria also extends to top officials of the Executive and Judicial branches.").

The President's Commission on Federal Ethics Law Reform (the Wilkey Commission) borrowed the Quadrennial Commission's definition of "honoraria."[30] Consistent with that definition, it focused on payments for speeches to special interest groups. Thus, it noted with approval that executive branch officials are forbidden from receiving honoraria for "any speeches, writings, or other actions undertaken in their official capacity" and contrasted that to the "notorious" practice in the legislative branch of accepting substantial sums for appearances at industry meetings. *To Serve With Honor* at 3-4, 35, J.A. 252-53. Against this backdrop, it is apparent that the "extreme lack of uniformity" targeted by the Wilkey Commission (*id.* at 35, J.A. 252) was the failure of the legislative branch to be held to the higher standards of the executive branch.[31]

In short, the government's reliance on the two commission reports is clearly misplaced. The all-encompassing definition of "honorarium" contained in Section 501(b) goes further than anything contemplated by either commission. That definition, and the regulatory definitions of covered activity, together preclude compensation for a range of activity that neither commission had identified

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[30] *To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform* 35 (Mar. 1989), J.A. 253-54 (*To Serve With Honor*).

[31] The government's effort to elevate the importance of the Wilkey Commission report is curious given Congress' disregard of the Commission's stated interest in having a "uniform" ban. As previously noted, the initial statutory provision did not include Senators and their staff within the scope of the ban.

as the source of any abuse or potential for abuse.[32] Indeed, neither commission even purported to study whether conflict of interest questions arise when, for instance, a government file clerk gets paid for giving a talk on growing roses or for writing about Black History Month. Their reports, therefore, simply cannot serve to explain the inexplicable—Congress' rationale in enacting the broad ban.

d. Lacking anything in the legislative record to establish a substantial interest in restricting receipt of compensation by career employees for speech that has no nexus to their jobs, the government is forced to revert to its own speculation. *See* Pet. Br. 18-20, 24-26. It observes that the public may be unaware of a particular employee's duties or whether a payor has business before the employee's agency. The government urges, therefore, that Congress "could have reasonably deemed" that the receipt of compensation by *any* employee for speech on *any* topic, from *any* payor, might create a public perception of impropriety. Pet. Br. 25.

The government's assertion that "[v]irtually any payment for employee speech could . . . trigger citizen concern" (*id.*) borders on the irrational. While public skepticism about the ethical practices of elected officials may be at an all-time high, it is less than self-evident that the public has similar suspicions about employees at every level of the career civil service. Further, the government provides no persuasive basis for expecting that public suspicions would be particularly aroused by receipt of

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[32] In fact, the Wilkey Commission expressly mentioned the writing of "scholarly articles" as an activity that "can benefit both the federal employees and society at large," which it "would not want to preclude or discourage." *To Serve With Honor* at 37, J.A. 256. It proposed to subject such activity, along with other income-producing activities, only to a general cap on outside earned income, applicable to Members of Congress, judges, and noncareer civil servants compensated at GS-16 and above. *Id.*

compensation for articles and speeches, as opposed to other income-producing activities.

In any case, even were the government's suppositions within the realm of reason, naked speculation about potential harms to governmental interests fails, as a matter of law, to justify the burden the ban imposes on First Amendment rights. As Justice Kennedy recently noted in an analogous context (*Turner Broadcasting*, 62 U.S.L.W. at 4658), "[w]hen the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" (Citations omitted). In fact, the government must make a substantial demonstration that its predictions of harm to its asserted interests as an employer are reasonable, where, as here, the speech at issue involves matters of public concern. *See, e.g., Waters v. Churchill*, 62 U.S.L.W. at 4401; *Rankin*, 483 U.S. at 388-89; *Pickering*, 391 U.S. at 567, 570-73.[33] It is beyond dispute that the government has failed to make the requisite demonstration in this case.

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[33] In an effort to establish its authority to speculate here, the government cites selectively from portions of the plurality's opinion in *Waters v. Churchill*, 62 U.S.L.W. at 4401, that summarized the various results that have been reached in this Court's public employee speech cases upon application of the *Pickering* balance. Pet. Br. 29, 31. The plurality did not, as the government appears to suggest, endorse a new highly deferential test for all restrictions on employee speech. Rather, it noted that on some occasions the Court had given "substantial weight" to the government's predictions of disruption, at least where those predictions were "reasonable." At the same time, the plurality confirmed that in "many" situations, "a public employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters." In those cases, the plurality recognized, "the government may have to make a substantial showing that the speech is in fact likely to be disruptive." *Waters*, 62 U.S.L.W. at 4401.

2. *The government has failed to show that a broad ban is necessary as a prophylactic measure or for administrative convenience*

The government further defends the excessive sweep of the ban as a prophylactic measure, necessary to avoid any risk of circumvention and for administrative convenience. Pet. Br. 20. This argument fails for two reasons. First, the ban is hardly the prophylactic measure "with no grey areas" that the government claims. Pet. Br. 25. Second, prophylactic rules that restrict First Amendment rights must be supported by an adequate justification; the ban is not.

a. As described *supra* at 5-6, 18-20, the ban is, by statutory design and by regulatory interpretation, decidedly "grey." There were, and are, significant gaps in the statute's coverage. Initially, of course, the ban excluded Senators and their staff. Now, faculty and students at Department of Defense schools are subject to a narrower restriction.[34] Moreover, while military officers and civilian employees at all grade levels are covered, *enlisted* military personnel are not covered by the ban.

From the standpoint of covered activity, as well, the statute draws arbitrary and irrational lines. First, the ban at best serves as a "prophylactic" only with respect to compensation for expressive activity, for it leaves employees free to engage in all other forms of moonlighting. More importantly, the ban offers ample opportunity for

[34] In the National Defense Authorization Act for Fiscal Year 1993, Congress enacted a narrow exception to the "honoraria" ban applicable to "a faculty member or a student at a Department of Defense school." Pub. L. 102-484, 106 Stat. 2413, codified at 10 U.S.C. 2161 note, App. 1a. Such individuals may accept an "honorarium," up to a maximum of $2000, for "an appearance, a speech, or an article published in a bona fide publication" if the undertaking "is customary for scholarly or academic activities normally associated with institutions of higher learning" and if it satisfies certain other conditions to assure the absence of a conflict of interest. App. 1a-3a.

evasion of its strictures as to compensation for expressive activity. It prohibits acceptance of honoraria for one or two appearances, speeches, or articles, but permits payment for three or more, if packaged as a "series."[35] It also permits payment for what the district court termed the "myriad other forms of expression" on the same subject from the same audience (Pet. App. 70a).

Moreover, the statute allows an individual to accept reimbursement for travel expenses (transportation, lodging and meals) for himself *and one relative*. It thereby continues the often-criticized practice of Members of Congress vacationing at posh resorts in exchange for some brief remarks.[36] Obviously, the typical civil servant is not offered similar all-expense-paid junkets.

The regulations OGE has issued have added countless exceptions to the categories of covered speech and to the definition of "honoraria." They distinguish between performance and appearance, poetry and prose, and article and chapter. They allow individuals to receive compensation for courses taught at a public or private university or public high school but not a private high school. *See* 5 C.F.R. 2636.203(a)(8), (9). They permit an individual compensation for his outside activity if he is on a payroll, but not if he is an independent contractor. *See id.* at 2636.203(a)(7).

It is thus clear, not only that the ban is a poor prophylactic, but that formidable administrative difficulties

[35] For Judge Silberman, Congress' insertion of the exception for "series" undermined "any asserted interest in a prophylactic flat ban on paid speeches." Pet. App. 101a (dissenting from denial of rehearing). For that reason, therefore, he suggested that he would have found the statute to be unconstitutional. *Id.*

[36] Such expense-paid trips to resorts—often of greater value than the now-forfeited honoraria—are commonly perceived by the public as an improper "perk" and an abuse of the Member's position. *See Getting Better on Ethics*, Wash. Post, April 27, 1994 (discussing legislative proposals to ban privately funded travel and lodging for substantially recreational "charitable events").

are inherent in the ban as enacted. Administration of its requirements requires both a centralized federal ethics office and individualized determinations by agency ethics officers—precisely those administrative costs that the ban was to have avoided. Pet. Br. 21. The government's argument that the ban serves its interest in avoiding the "administrative difficulties" that would attach to a rule dependent on case-by-case judgments (Pet. Br. 20-21) is simply not credible.[37]

In short, Section 501(b) cannot seriously be cast as a uniform and impermeable ban, and defended on that basis. It shares precisely those flaws that a prophylactic ban is supposed to avoid: it is easily circumvented by an employee inclined to redirect his energies into one of the permissible activities; it is difficult to interpret and to administer; and it rests on narrow and arbitrary distinctions that damage the credibility of the provision as a whole, as well as governmental ethical standards in general.

b. In any event, even assuming that the ban is appropriately characterized as a prophylactic measure, its impact on expressive activities is not sufficiently justified by important government interests. Broad prophylactic rules affecting speech are, as a general rule, constitutionally "suspect." *See NAACP v. Button*, 371 U.S. 415, 438 (1963). Here, the court of appeals found the "excess

[37] Contrary to the government's claim (Pet. Br. 21-22 n.19), there is no real difference between the type of subjective interpretations required in determining whether conduct constitutes a conflict of interest and those required to determine whether a particular activity falls within the scope of the regulations. As discussed *supra* at 18-20, the latter inquiry may require subtle distinctions based on the content of the expressive activity. Moreover, administration of the "series" exception will require a case-by-case review of the nexus between the speech and the payor, a review identical to that required under pre-existing conflict of interest rules.

sweep of the ban" supported by nothing more than "theoretical possibilities." Pet. App. 14a.

The government objects that, in so concluding, the court of appeals improperly held Congress to the same burden applied in *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). It contends that those cases did not apply a "lenient" government employee First Amendment standard, but instead examined "fully protected" speech by "private persons." Pet. Br. 30.

The government's objection is unpersuasive. Even in the sphere of commercial speech, where there is an analogous "lenient" standard which considers only whether a restriction on speech is "tailored in a reasonable manner" (*Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993)), this Court has consistently recognized that something more than unsubstantiated speculation is required to sustain a "prophylactic" measure that burdens speech activities. It has instructed that prophylactic measures may not be "lightly justified." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 649 (1985). Rather, a prophylactic measure may be justified only where it addresses what "is in fact a serious problem" and where the State has shown "that the preventative measure it proposes will contribute in a material way to solving that problem." *Edenfield*, 113 S. Ct. at 1803 (finding unconstitutional a restriction on commercial speech justified as a prophylactic rule in the absence of a showing that the State's fear was "well founded"). *Accord Ibanez v. Florida Dept. of Business & Prof. Regulation, Bd. of Accountancy*, 62 U.S.L.W. 4503, 4505, 4507 (S. Ct. June 13, 1994); *Turner Broadcasting*, 62 U.S.L.W. at 4658 (plurality opinion).

The government's purported justification for the honoraria ban does not remotely satisfy these principles. As we showed *supra* at 28 n.21, 31 n.25, beyond its resort to inapposite analogies, the government has not even

attempted to establish a "serious" existing or potential problem of abuse of honoraria by career government employees. Indeed, it tacitly admits that there was no evidence of abuse outside the legislaitve branch (Pet. Br. 28-29) or even the perception of abuse (*see* Pet. Br. 31-32) when Congress enacted Section 501(b).

The government's argument, in addition, incorrectly presumes that the pre-existing regulatory and statutory scheme created "administrative difficulties." As the court of appeals noted, the government never attempted to identify "any serious enforcement or line-drawing costs" associated with the prior regulations. Pet. App. 11a. At most, the government has pointed to isolated problems, which have already been addressed by OGE.[38]

c. Finally, the government's effort to manufacture a conflict between the result the court of appeals reached here and the Hatch Act cases (Pet. Br. 26-28) is mis-

[38] The government relies on a report by the General Accounting Office (reprinted as an appendix to Common Cause's brief filed Mar. 24, 1994), which issued *after* the enactment of Section 501(b), to show the "difficulties of a more limited ban." Pet. Br. 22-23. That reliance is unavailing. The GAO report surveyed 11 agencies and identified some concerns with certain of the agencies' approval processes for outside employment in general, including the amount of information required by the agencies. CC App. 9a-11a. It further noted some activity approved by the agencies that focused, in its opinion, on the agencies' responsibilities or the employees' official duties. *Id.* at 13a-16a. Only some of that conduct involved speech that would be covered by the honoraria ban. *Id.* at 8a-9a, 12a (Tables 1 and 2).

Several of the agencies disagreed with GAO's definition of job-relatedness or its conclusion that the activity constituted a conflict of interest. *Id.* at 23a. Even assuming, however, that GAO is correct in its assessment of the degree of "relatedness" and in the conclusions it drew, it found few instances of questionable conduct. Moreover, it concluded that the risk of a conflict could be minimized if appropriate criteria were applied by the agency. *Id.* at 20a. OGE subsequently issued comprehensive government-wide regulations that it believes answer GAO's concerns. *Id.* at 21a-22a.

placed. In fact, the court of appeals explicitly acknowledged "the authority of Congress to enact broad prophylactic rules" under *Mitchell* (Pet. App. 12a). It held, however, that the justification offered here for such a rule fell short of that provided in *Mitchell*.[39]

The court of appeals' conclusion was correct. This Court sustained the Hatch Act restrictions on employee speech because they were aimed at a well-documented threat affecting employees throughout the government. Thus, in *Mitchell*, 330 U.S. at 103, the Court upheld the Hatch Act prohibitions in the context of a *demonstrated* "menace" of public employee involvement in partisan politics. The executive branch had regulated such involvement for decades before Congress enacted legislation. Over the years, that regulation had been approved in some form by both the courts and "a large body of informed public opinion." *Id.* Moreover, the evils addressed by the Hatch Act—political partisanship by the civil service—extended to every level of the service. As the Court observed, political activity by even a non-policy-making employee, such as a roller in the Mint, might "promote or retard his advancement or preferment with his superiors." *Id.* at 101.

Similarly, when this Court returned to the issue in *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973), it underscored the "judgment of history," from Thomas Jefferson

[39] The government's assertion (Pet. Br. 28) that the court of appeals limited *Mitchell* to "subtle forms of abuse" is incorrect. The court simply noted that less evidence would be expected to justify a prophylactic rule where, as in *Mitchell*, it would be "in the nature of the evil to be averted that it will be concealed." Pet. App. 13a. There, the potential for supervisory pressure on subordinates to vote a certain way or perform political chores would be "not only pervasive but inherently difficult to demonstrate or assess." *Id.* Here, by contrast, the court found no reason to believe that a public perception of corruption would not be readily apparent, if it existed. *Id.* at 13a-14a.

and the reformers in the 19th century to the Civil Service rules as evolved in the last century, that vital government interests are clearly at risk when public employees become involved in partisan politics. The Court further cited the abundant record evidence demonstrating a clear need to protect government workers from supervisory coercion; to ensure merit-based employment decisions; and to guard against real and apparent abuses in enforcement of the law. *Id.* at 564-66.

In short, there was a documented record of abuse and decades of regulation to support the congressional concerns behind the Hatch Act, and those concerns were clearly articulated. Here, by contrast, there is no similar history of actual abuses and the legislative record is virtually silent on any subject other than receipt of honoraria by Members of Congress. And while the Hatch Act "evolved over a century of governmental experimentation with less restrictive alternatives that proved inadequate to maintain the efficient operation of government," [40] the ban on receipt of "honoraria" by career employees was casually superimposed upon a regulatory scheme that had been essentially sound. The lower court's analysis and conclusions are thus fully consistent with *Mitchell* and *Letter Carriers* and should be affirmed by this Court.

III. The Court of Appeals' Remedy Is Appropriate to the Violation Found

The court of appeals determined that Section 501(b) is unconstitutional because it is not limited to writing and speaking activities that bear a sufficient nexus to federal employment. The court recognized that the root of the statute's constitutional defect is in its design—that by encompassing all articles and speeches (including those in which there is no such "nexus"), the statute

[40] *FCC v. League of Women Voters of California*, 468 U.S. 364, 401 n.27 (1984) (characterizing Hatch Act).

limits the exercise of First Amendment rights far more than reasonably necessary to further the government's interests.

To remedy the statute's defects, the court accommodated competing jurisprudential principles. It invalidated Section 501(b) insofar as it limited the speech of executive branch employees—those as to whom a constitutional defect had been shown—while leaving intact those applications to other branches that had not been challenged and that raise "quite different considerations." Pet. App. 14a.

The government contends that the court's remedy was "overbroad." Pet. Br. 36. It urges that the court should not have struck the ban as to the entire executive branch, but should have declared the ban unconstitutional as applied to speech lacking a nexus to federal employment, and enjoined its application only to that extent. *Id.* at 37-38, 42-43.

A. At the outset, we note that adherence to the precise remedial formulation adopted by the court of appeals is not, as a practical matter, crucial to vindication of respondents' First Amendment rights. Respondents include approximately a dozen named plaintiffs who are employed within the executive branch at grades GS-16 and below, as well as similarly situated unnamed employees at grades GS-15 and below. Before the statutory honoraria ban went into effect, all of them were allowed to receive compensation for their writing and speaking activities. *See, e.g.*, J.A. 11 (defining class).

Respondents' central aim was to obtain an injunction precluding the government from enforcing the statutory ban as to their receipt of compensation for writing and speaking that does not create either a real or apparent conflict with their federal employment. That practical result was achieved by the court of appeals' ruling. It could also be achieved by a remedy similar to the one

urged by the government—by holding the ban invalid as applied to respondents' writing and speaking activities, which have no nexus to their federal employment.

B. Respondents maintain, however, that the approach followed by the court of appeals is plainly defensible and consistent with the "principle that a statute should not be invalidated to a greater extent than is necessary" (Pet. Br. 36). This Court's precedent teaches that where, as here, "the scope of invalid applications" of a statute is large, a statute is not properly tailored and thus subject to facial invalidation. *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984) (where a statute is not adequately tailored, it fell "short of constitutional demands" "on its face.") *See also Simon & Schuster*, 112 S. Ct. at 511-12 (Court held invalid on its face a financial disincentive imposed on speech, where the restriction was "significantly over-inclusive" and was "not narrowly tailored").

In this case, the court correctly identified the statute's fundamental defect as facial in nature. The statute extended a burden on speech to all employees in the executive branch, including career civil servants at the lowest levels, and encompassed all articles and speeches, including those that had no connection to federal employment. It had no clearly identifiable "core" of constitutionally permissible applications. *Munson*, 467 U.S. at 965.

The government argues unconvincingly that the court of appeals was required to identify and define the circumstances in which there would exist a constitutionally adequate "nexus" betwen the subject matter of the expression or the character of the payor, and devise a remedy on that basis. Pet. Br. 37-38.[41] As the court of appeals

[41] Significantly, the government never proposed a "limiting construction" to the court of appeals, as that court pointed out. Pet. App. 14a. Instead, it waited until its petition for rehearing to suggest that the court should have limited its order to the "invalid applications" by articulating a nexus test. Pet. for Reh., filed May 13, 1993, at 10.

recognized, the drafting of an appropriate nexus test—one that prohibits receipt of compensation only where it would create a real or apparent conflict with federal employment—"would seem a purely legislative act" (Pet. App. 14a).

In fact, Congress has wrestled with the exact bounds of a nexus test in considering proposed legislation concerning government employees' receipt of "honoraria"; the House and Senate bills contained somewhat different job relatedness tests, together with different definitions of covered employees and prior reporting requirements.[42] The statute itself contains an abbreviated nexus test with respect to "series" of appearances, speeches, and articles, while Congress enacted a far more elaborate nexus test to be applied to speech by faculty members and students at Defense Department schools. 10 U.S.C. 2161 note, Sec. 542(a)(1)-(4), 542(b); App. 1a-3a. And while criticizing the court of appeals' refusal to craft a test, the government in its brief suggests no specific alternative of its own.[43]

[42] *Compare* H.R. 3341, 102d Cong., 1st Sess. (1991), which was passed by the House of Representatives on November 25, 1991, *with* S. 242, 102d Cong. 1st Sess. (1991) and accompanying report, S. Rep. No. 29, 102d Cong., 1st Sess. 8-14 (1991) (both appended to our brief to the court of appeals).

[43] Amicus Common Cause would have the Court insert a test that permits acceptance of "honoraria" only by employees who exercise "insufficient discretion" in the performance of their duties. CC Br. 25. That test would not only require the Court to engage in the purest form of legislative line-drawing, it would also run contrary to all available evidence as to legislative intent. Proposed bills to amend Section 501(b), which had the support of virtually all members of Congress, the administration and Common Cause itself, exempted all career government employees, regardless of grade or responsibilities. *See supra* at 33-34 n.28.

Common Cause (but not the government) further suggests that the lower court erred in striking the ban as to *all* executive

In short, the government's statement that "[i]f the nexus concept serves to identify the *unconstitutional* applications of Section 501(b), . . . it can also serve to identify the *constitutional* applications of Section 501(b)" (Pet. Br. 38, emphasis in original) is a gross oversimplification. The course the government suggests collides with the time-honored principle that a court is not to sustain the constitutionality of a statute by inserting words "that are not now there" for to do so "would be to make a new law, not to enforce an old one." *United States v. Reese*, 92 U.S. 214, 221 (1875). *Accord, Hill v. Wallace*, 259 U.S. 44, 70-71 (1922). *See generally Heckler v. Mathews*, 465 U.S. 728, 741-42 (1984) (and cases cited); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). The court of appeals' decision to leave the redrafting of Section 501(b) to Congress was, therefore, entirely reasonable.

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branch employees on the additional ground that the plaintiffs did not have standing to challenge the ban with respect to senior career employees or political appointees within the executive branch. CC Br. 24-25. As an initial matter, we point out that one of the individual plaintiffs is a GS-16 career executive branch employee (*see supra* at 7 n.7). In any event, principles of standing determine whether a party has sufficient interests at stake to invoke the court's jurisdiction; Common Cause cites no authority for its suggestion that those principles preclude a court from issuing a remedy that inures to the benefit of persons not before the court. Indeed, an injunction striking a statute on its face routinely benefits persons who are not parties.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 1994

APPENDIX

APPENDIX

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1993

Pub. L. 102-484, Div. A, Title V, 106 Stat. 2413 (Oct. 23, 1992), codified at 10 U.S.C. 2161 note

Sec. 542. Authority for Military School Faculty Members and Students to Accept Honoraria for Certain Scholarly and Academic Activities.

(a) AUTHORITY TO ACCEPT HONORARIA.—Notwithstanding the prohibition on the acceptance of honoraria contained in section 501(b) of the Ethics in Government Act of 1978, a faculty member or a student at a Department of Defense school specified under subsection (d) may accept an honorarium for an appearance, a speech, or an article published in a bona fide publication if such an appearance, speech, or article is customary for scholarly or academic activities normally associated with institutions of higher learning and if—

(1) the purpose of the appearance, or the subject of the speech or article, does not relate primarily to the responsibilities, policies, or programs of the school at which the individual is a faculty member or student;

(2) the appearance, speech, or article (including the individual's time in specific preparation for the appearance, speech, or article) does not involve the use of Government time, Government property, or other resources of the Government or the use of nonpublic Government information;

(3) the reason for which the honorarium is paid is unrelated to the individual's duties or

status as a member of the Armed Forces or employee of the Government or as a faculty member or student at a school specified in subsection (d); and

(4) the person offering the honorarium has no interests that may be substantially affected by the performance or nonperformance of the individual's duties as a member of the Armed Forces or an employee of the Government or as a faculty member or student at a school specified in subsection (d).

(b) SPECIAL RULE CONCERNING SUBJECT MATTER.—For purposes of subsection (a)(1), an appearance, speech, or article on a subject matter that is within an individual's academic or military specialty, in the case of a faculty member, or an individual's course of academic study, in the case of a student, shall not be considered to relate primarily to the responsibilities, policies, or programs of the school at which the individual is a faculty member or student if the preparation and presentation of the particular appearance, speech, or article is clearly outside of the individual's duties.

(c) NONCOVERAGE OF HIGHLY PAID FACULTY MEMBERS.—Subsection (a) shall not apply to acceptance of an honorarium by a faculty member who is employed in a position for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5302 of title 5, United States Code (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the rate of basic pay payable for Level V of the Executive Schedule.

(d) COVERED SCHOOLS.—(1) This section applies with respect to faculty members and students at any of the service academies and at any professional military school operated by the Department

of Defense that is designated by the Chairman of the Joint Chiefs of Staff to be covered by this section.

(2) For purposes of paragraph (1), the term "service academies" means—

(A) the United States Military Academy;

(B) the United States Naval Academy; and

(C) the United States Air Force Academy.

(e) HONORARIUM DEFINED.—For purposes of this section, the term "honorarium" means a payment of money or anything of value for an appearance, a speech, or an article (including a series of appearances, speeches, or articles).

(f) MAXIMUM AMOUNT OF HONORARIUM.—The amount of any honorarium accepted under this section shall not exceed the usual and customary fee for the appearance, speech, or article for which the honorarium is paid, up to a maximum of $2,000.

(g) EFFECTIVE DATE.—This section shall apply with respect to any honorarium for an appearance or speech made, or an article published, on or after the date of the enactment of this Act.